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PLR-131278-15

Date:

March 14, 2016

Legend

Foundation =

Year 1 =

Year 2 =

Company =

A =

B =

C =

Firm =

Dear :

This letter responds to Foundation's ruling request dated September 8, 2015 and subsequent correspondence submitted by its authorized representatives for discretionary relief under Treas. Reg. § 301.9100-3 for an extension of time to make the election under Treas. Reg. § 53.4942(a)-3(c)(2)(iv).

FACTS

Foundation is recognized as an organization described in I.R.C. § 501(c)(3) and classified as a private foundation under I.R.C. § 509(a). Foundation provides grants to further the charitable purposes of organizations described in § 501(c)(3).

During Year 1, Foundation received contributions of A dollars, including cash of B dollars and appreciated real property with a fair market value of C dollars. The real property was contributed based on the understanding that Foundation would take the

necessary steps to qualify as a conduit foundation within the meaning of I.R.C. § 170(b)(1)(F)(ii).

Foundation engaged Company, a well-regarded and experienced tax return preparation company, to prepare Foundation's Year 1 Form 990-PF. Foundation relied on Company to advise Foundation on the proper completion of the Form 990-PF. In connection with the preparation of the Year 1 Form 990-PF, Company calculated the excess distribution carryovers in a manner that was consistent with having made a valid election under Treas. Reg. § 53.4942(a)-3(c)(2)(iv) by not reducing the carryover from the Year 1 Qualifying Distributions. However, the election to apply distribution carryovers to meet the conduit foundation requirement was not made when the Year 1 Form 990-PF was prepared and filed.

Firm discovered Foundation's failure to make the election for Year 1 in March 2015, as a result of Firm's subsequent review of Foundation's Year 1 Form 990 PF in connection with a proposed donation of property to Foundation. Upon this discovery, Firm notified Foundation and Foundation immediately decided to seek permission to make and attach a late election to its Forms 990-PF for Year 1 and Year 2.

Foundation has submitted a sworn affidavit from an officer of Company. The affidavit declares that Company failed to include any amount on Part VII, Line 7, the line used to indicate distributions out of corpus in order for Foundation to qualify as a "conduit foundation" within the meaning of § 170(b)(1)(F)(ii) of the Code. Company also declared that it failed to make, or inform Foundation of the availability of, the election under § 53.4942(a)-3(c)(2)(iv) of the Regulations to apply distribution carryovers to meet the conduit foundation requirement at the time the Year 1 Form 990-PF was prepared and filed.

The information returns prepared by Company met the requirement to make the election. Foundation asserts that none of the excess qualifying distributions were used for any other purpose, and there was no intention to use them for any other purpose.

LAW AND ANALYSIS

Section 170(b)(1)(F)(ii) provides, in part, that contributions by an individual to a private foundation that makes qualifying distributions that are treated as distributions out of corpus in an amount equal to 100 percent of the contribution within three months and 15 days of the end of the private foundation's taxable year, are deductible at 50 percent of the Foundation's contribution base for the taxable year.

Section 4942(a) provides for the imposition on the undistributed income of a private foundation for any taxable year, which has not been distributed before the first day of the second (or any succeeding) taxable year following such taxable year (if such first day falls within the taxable period), a tax equal to 30 percent of the amount of such

income remaining undistributed at the beginning of such second (or succeeding) taxable year.

Section 4942(d) defines a private foundation's "distributable amount" for any taxable year as an amount equal to (1) the sum of the minimum investment return plus the amounts described in subsection (f)(2)(C), reduced by (2) the sum of the taxes imposed on such private foundation for the taxable year under subtitle A and § 4940.

Section 4942(h) provides rules as to the treatment of "qualifying distributions" made during a taxable year. Generally, qualifying distributions for a taxable year are treated as made (A) first out of the undistributed income of the immediately preceding taxable year (if the private foundation was subject to tax imposed by this section for the preceding year) to the extent thereof, (B) second out of undistributed income for the taxable year to the extent thereof, and (C) then out of corpus.

Section 53.4942(a)-3(c)(2)(iv) provides that a donee organization may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus under paragraph (d)(1)(iii) of this section provided that (a) such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section or a redistribution under this paragraph for a prior year, (b) such corpus distribution occurred within the preceding 5 years, and (c) such amount is not later availed of for any other purpose. Such election must be made by attaching a statement to the return the foundation is required to file under § 6033 with respect to the taxable year for which such election is to apply. Such statement must contain a declaration by an appropriate foundation manager (within the meaning of § 4946(b)(1) that the foundation is making an election under this paragraph and it must specify that the distribution was treated under paragraph (d)(1)(iii) of this section as a distribution out of corpus in a designated prior taxable year (or years). This election is permissible in order to satisfy distribution requirements under § 170(b)(1)(F)(ii).

Furthermore, for purposes of making the election, an extension of time for making the election may be available under the relief provisions found in Treas. Reg. § 301.9100-1. Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in Treas. Regs. §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Section 301.9100-1(b) defines a "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections may be granted when a foundation provides evidence to establish to the satisfaction of the Commissioner that a foundation acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides that a foundation is deemed to have acted reasonably and in good faith if the foundation:

- (i) Requests relief under this section before the failure to make the regulatory election is discovered by the Service;
- (ii) Failed to make the election because of intervening events beyond the foundation's control;
- (iii) Failed to make the election because, after exercising reasonable diligence (taking into account the foundation's experience and the complexity of the return or issue), the Foundation was unaware of the necessity for the election;
- (iv) Reasonably relied on the written advice of the Service; or
- (v) Reasonably relied on a qualified tax professional, including a tax professional employed by the foundation, and the tax professional failed to make, or advise the foundation to make the election.

Section 301.9100-3(b)(2) provides that a foundation will not be considered to have reasonably relied on a qualified tax professional if the foundation knew or should have known that the professional was not:

- (i) Competent to render advice on the regulatory election; or
- (ii) Aware of all relevant facts.

Section 301.9100-3(b)(3)(ii) provides, in part, that a foundation is deemed to have not acted reasonably and in good faith if the foundation was informed in all material respects of the required election and related tax consequences, but chose not to file the election.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in the foundation having a lower tax liability in the aggregate for all taxable years affected by the election than the foundation would have had if the election had been timely made.

Section 301.9100-3(d)(2) provides, in part, that for relief to be granted, the Service may require the foundation to consent under § 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

Section 301.9100-3(e)(2) & (3) specifies evidence which must be provided when a foundation requests relief under this section which includes (a) affidavit and declaration from foundation and (b) affidavits and declarations from other parties.

Section 301.9100-3(e)(4) further requires additional information to support request for relief under § 301.9100-3(a) which includes:

- (i) The foundation must state whether the foundation's return(s) for the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made is being examined, or is being considered by an appeals office or a federal court. The foundation must notify the Service office considering the request for relief if the Service starts an examination of any such return while the foundation's request for relief is pending;
- (ii) The foundation must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;
- (iii) The foundation must submit a copy of any documents that refer to the election;
- (iv) When requested, the foundation must submit a copy of the foundation's return for any taxable year for which the foundation requests an extension of time to make the election and any return affected by the election; and
- (v) When applicable, the foundation must submit a copy of the returns of other Foundations affected by the election.

Foundation is an organization recognized as exempt under § 501(c)(3) and classified as a private foundation under § 509(a). Foundation is a private foundation required to distribute all undistributed income by the close of the following tax year. See § 4942(a); see also § 4942(d) which defines "distributable amount."

Pursuant to § 53.4942(a)-3(c)(2)(iv), a private foundation may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus provided that such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section, or a redistribution under this paragraph for a prior year, and such corpus distribution occurred within the preceding five years, and such amount is not later availed for any other purpose. This election is allowed in order to satisfy distribution requirements under § 170(b)(1)(F)(ii). The election must be made by attaching a statement to the return the foundation is required to file under § 6033 with respect to the taxable year for which the election applies. The statement must contain a declaration by an appropriate foundation manager, within the meaning of § 4946(b)(1) that the foundation is making an election under this paragraph and it must specify that the distribution was treated under paragraph (d)(1)(iii) of this section as a distribution out of corpus in a designated prior taxable year, or years.

Foundation did not properly make this election when it timely filed each of its Year 1 and Year 2 Form 990-PFs. However, Foundation asserts that it met the requirements in

each of those years to make the election and that it acted reasonably and in good faith at all times because it relied on the experience of a qualified tax professional to properly prepare its returns.

Under § 301.9100-3(a), when the foundation is required to make the election under § 53.4942(a)-3(c)(2)(iv) but omits to, a request for an extension of time for regulatory election(s) may be granted if the foundation provides evidence (including an affidavit) to establish to the satisfaction of the Commissioner that the foundation acted reasonably and in good faith, and the grant of the relief will not prejudice the interests of the Government. As further explained in § 301.9100-3(b)(1), the foundation will be deemed to have acted reasonably and in good faith if, among other things, the foundation requests relief under this section, before the failure to make the regulatory election is discovered by the Service, or if the foundation failed to make the election because of intervening events beyond their control, or failed to make the election because after exercising reasonable diligence (taking into account the foundation's experience and the complexity of the return or issue), the foundation was unaware of the necessity of the election, or the foundation reasonably relied on a qualified tax professional, including a tax professional employed by the foundation, and the foundation failed to make, or advise the foundation to make, the election.

Foundation provided documentation which included an affidavit from Company, a well-regarded and experienced tax preparation firm, to support the position that it acted reasonably and in good faith as required by § 301.9100-3(b)(1). Foundation reasonably relied on Company to properly advise it about the returns they prepared for Foundation and to explain the technical areas of the Form 990-PF. Foundation exercised reasonable diligence and held review meetings with the preparer to explain the excess distribution carryover. Foundation did not have any reason to believe that Company was not competent to render advice about required regulatory elections. In addition, the discovery of the failure to properly make the election on the Form 990-PF for Year 1 and Year 2 was by Firm rather than by the Internal Revenue Service.

In order to qualify for discretionary relief, a foundation must demonstrate that the interests of the Government will not be prejudiced by the granting of relief as required under § 301.9100-3(c)(1). The interest of the Government is prejudiced if granting such relief would result in a foundation having a lower tax liability than if the election had been timely made. Foundation represented and provided support to show that its request for relief for the late filing of an election under § 53.4942(a)-3(c)(2)(iv) to treat as current distribution out of corpus the amounts distributed in the prior taxable years, that are available as excess distributions carryovers held in corpus, does not result in it or its grantor(s) having lower tax liabilities than if they had timely properly filed such election. The affidavits and other evidence provided satisfy the requirements of § 301.9100-3(b)-(c) and the procedural requirements of § 301.9100-3(e). Therefore, to grant Foundation an extension of time to make the election will not prejudice the Government's interest.

RULING

Based solely on the facts and representations submitted by Foundation, we conclude that the requirements of § 301.9100-3 have been satisfied. As a result, Foundation is granted an extension of time to make an election under § 53.4942(a)-3(c)(2)(iv) in replacement of the unsigned elections filed with the Year 1 and Year 2 returns. The election shall be made by filing an amended Forms 990-PF for these years and attaching a statement making the election to each amended return. Foundation shall have 60 days from the date of this letter ruling to file the amended returns. The amended returns and subsequent returns should reflect the revised carryover amounts.

In addition, a copy of this letter must be attached to the relevant returns. If Foundation files electronically it may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

Pursuant to the Power of Attorney on file with this office, we are sending a copy of this letter to your authorized representatives.

Sincerely,

Andrew F. Megosh, Jr.
Senior Tax Law Specialist, EO Branch 2
(Tax Exempt & Government Entities)